Nos. 541, 542

Supreme Court of the United States

OCTOBER TERM, 1953

HARVEY STOLLER d/b/a RICHLAND LAUNDRY AND DRY CLEANERS, and LAUNDRY AND DRY CLEANERS UNION, LOCAL 197, AFFILIATED WITH LAUNDRY WORKERS INTERNATIONAL UNION, A.F.L., *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION OF HARVEY STOLLER, *ET AL.*, FOR REHEARING OF ORDER DENYING WRIT OF CERTIORARI

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The petition of Harvey Stoller d/b/a Richland Laundry and Dry Cleaners and Laundry and Dry Cleaners Union, Local 197, A.F.L., for a *writ of certiorari* directed to the Court of Appeals for the Ninth Circuit (which opinion below was reported at 207 F.(2d) 305 and in which opinion the decision of the National Labor Relations Board, 93 N.L.R.B. 680 was affirmed) was by this court denied March 8th, 1954.

This is a petition respectfully praying this court to reconsider its order denying, and to grant an order to issue, a writ in this case.

Petitioners are thoroughly conscious of the fact that petitions for rehearing are most strictly scrutinized and but rarely successful. With that consideration in mind,

petitioners feel, however, that it is by no means idle to bring to this court's attention certain intervening circumstances and events of most recent occurrence which, in petitioners' judgment, directly and substantially affect the merits of the problem outlined in our original petition for a writ.

The ground upon which we earnestly urge a rehearing is the action which the Board has recently taken—action taken in fact since the decision of the Court of Appeals below was issued. The Board has substantially altered its policy and has squarely repudiated the very principle upon which the *Stoller* decision was based. This leaves the *Stoller* decision to stand alone—a case *sui generis*. The vice inherent in this circumstance is the peculiar plight in which this action leaves Stoller and the other petitioners herein. Stoller's business is penalized. Everyone else in the same business, under similar circumstances, goes free of penalty. Stoller suffers a loss assessed against him by the Board in the amount of $8,000.00 while his competitor across the street, or in the same area, or for that matter in the same business elsewhere throughout the United States, enjoys immunity from such penalty. To the extent to which Stoller is deprived of $8,000.00, under a policy which the Board now admittedly repudiates and disavows, his competitors enjoy a corresponding and commensurate advantage. He is discriminated against; they are favored. Such a result is abhorrent to fundamental principles of justice. It is condemned by the principle that government, in its dealings with its citizens, shall operate under a uniform rule of law, equally and fairly applied, rather than under a case-to-case application,

based upon unpredictable agency whim, fancy or pleasure. To allow the decision below to stand would effectually be a reversion to the dictim of the Caesar's: *"Sic volo, sic jubeo."*

This is not a problem which concerns Stoller alone; it involves a principle of utmost and nation-wide importance to the complex and ever increasing administration of the National Labor Relation Board's procedure. It is a problem which, may we submit, should be settled by this court.

It is our position that the National Labor Relations Board has recently so substantially changed its policy as to constitute a complete and total repudiation of the result which it reached in the *Stoller* decision. In that decision it undertook to assert jurisdiction over a local laundry in Richland, Washington, no different in any respect than a dozen or more other local competing laundries in the area, and it grounded its jurisdiction upon the circumstance that Richland, Washington, is located within the Hanford Atomic Energy Project, and therefore a part of national defense. The Board went farther before the Court of Appeals for the Ninth Circuit, and undertook to base its jurisdiction upon a purely incidental circumstance involving the purchase of some $12,000 worth of soap and solvents outside the state of Washington. Otherwise, operation of the laundry in question was recognized to be overwhelmingly and preponderantly local in character. The opinion of the Ninth Circuit supports the Board in its position. Thus we have the employer, Stoller, in a class with a substantial number of other competitors where he,

alone, is singled out and subjected to a regimen whereby he is ordered to offer reinstatement, and to make back payments, to employes in an amount, including interest, of approximately $8,000.00.

Our argument that this constituted arbitrary and discriminatory treatment and that it was a violation of that fundamental fair play and equal treatment constituting the very essence of due process has, since the decision was handed down by the Board, been reinforced and fortified with noteworthy and controlling emphasis by reason of recent decisions of the Board under which it is clearly and unequivocally established that the Board now has withdrawn from exercising jurisdiction over local enterprises such as that of the petitioner Stoller. The result is and has been that Stoller has been invidiously singled out for federal or governmental action penalizing him in an amount of $8,000.00, while his competitors and all others engaged in pursuing similar activities under identical circumstances are exempted therefrom.

General counsel for the Board will not dispute the fact that the Board has definitely and objectively repudiated the policy which it undertook to apply to the *Stoller* case. In his brief, reciting our original petition in Cause 541 and 542, General Counsel admits that fact, citing cases, some of which we may summarize as *Taichert's, Inc.*, 107 N.L.R.B. 167, involving a small variety store in the Atomic Energy area at Los Alamos, New Mexico, as well as *Ideal Laundry & Dry Cleaners*, 107 N.L.R.B. 186, practically a counterpart of the facts of our case. Other recent decisions, not cited, underlin-

ing the purpose of the Board to avoid the assertion of such jurisdiction are *McArthur Jersey Farm Dairy, Inc.*, 107 N.L.R.B. 171, and *Rubino, et al., d/b/a Alpine Mill & Lumber Company*, 107 N.L.R.B. 172.

General counsel's position, as asserted in his brief, does not, we submit, meet the exigency of the problem we have posed. The fact that the Board, he asserts, has disavowed any repudiation of the arbitrary action taken in the *Stoller* case, minimizes the importance of the problem otherwise inhering herein, so as to obviate the propriety of a *writ of certiorari*. Surely the problem is here none the less important merely because the Board, having singled out Stoller for its penal action, promises not to repeat such arbitrary and discriminatory conduct again in any other case.

The question here reaches much beyond the perimeter of that narrow statement of the problem. It goes to whether or not the Board has the power on a case-by-case basis to single out "A" and to exempt "B." Under our system of jurisprudence, state or federal, are we not warranted in our view that every citizen in an identical category or within similar classifications is entitled to equal treatment and equal application of the law? Is the Board over and beyond the restraint of that salutary constitutional principle? It certainly cannot be said that this court regards the problem, when viewed from this aspect, as merely a minor, trivial matter, of no substantial national or public importance. This court has not hesitated in many outstanding and celebrated decisions to vindicate the right of the individual citizen to the full benefit of constitutional protection. This is true in civil right cases. It is true in cases involving freedom

of speech, freedom of religion, and a long line of cases within the last decade or two under the First, Fifth and Fourteenth Amendments. This court has thought it of such importance that it has most recently called upon the National Labor Relations Board to submit a report to it of its policy in respect to the issue herein outlined.

The Board's action in assessing a penalty against Stoller and other petitioners, while frankly declining to do so in many other identical or similar cases, must be rectified; otherwise, Stoller and petitioners necessarily stand to suffer irreparable injury. Petitioning union some time ago filed a petition for representation before the Board. Pending the disposition of this litigation, however, the Board declined to process the petition. Now, let us contemplate the serious anomaly in which petitioners find themselves. The Board has penalized petitioners by ordering reinstatement and $8,000.00 back pay but, in virtue of its new policy and recent decisions repudiating that action, is now compelled to refuse to recognize a petition for representation. Petitioners, therefore, are caught squarely between the upper and nether millstones. Nothing can extricate them except an authoritative definitory decision of this court.

Petitioner Stoller and the other petitioners in this cause have only one avenue of relief. They can look only for redress to this court. This court alone has the power to insure that this petitioner and others similarly affected throughout the United States shall be protected against arbitrary agency action—against case-by-case action—whereby the petitioner, for example, may today

be visited with a penalty from which his competitors are exempt; tomorrow it may be that he is exempt while they may be subjected to penalty. Certainly, where the Board, having acted solely against the petitioner, disavows similar action against his competitors, somewhere in our judicial sytsem there should be a remedy. Only this court can grant it and we respectfully urge the propriety of granting the petition in this matter, so that a uniform rule of law may be laid down whereby all affected by actual or potential power of an agency such as the National Labor Relations Board may have a clear definition both of their rights and of their remedies. Only by a decision of this court can the principle of uniformity in agency action, and particularly Board action quasi-judicial in nature, be assured. Only by a decision of this court can the petitioner and many others similarly circumstanced throughout the United States receive relief from discriminatory, arbitrary case-to-case action by the Board.

Respectfully submitted,

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